Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1152

GLENN N. HEFNER, Individually And On Behalf Of All Other Persons Similarly Situated,

Plaintiff-Appellant,

versus

THE NEW ORLEANS PUBLIC SERVICE, INC., THE CO-OPERATIVE STREET RAILWAY EMPLOYEES ASSN. OF NEW ORLEANS
and
THE AMALGAMATED TRANSIT UNION, DIVISION NO. 1560,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JURISDICTIONAL STATEMENT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

NO.

GLENN N. HEFNER, Individually And On Behalf Of All Other Persons Similarly Situated,

Plaintiff-Appellant,

versus

THE NEW ORLEANS PUBLIC SERVICE, INC., THE CO-OPERATIVE STREET RAILWAY EMPLOYEES ASSN. OF NEW ORLEANS
and
THE AMALGAMATED TRANSIT UNION, DIVISION NUMBER 1560,

Defendants-Appellees

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JURISDICTIONAL STATEMENT

THE OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana appears herein in Appendix A, page A-1.

The decision of the United States Court of Appeals for the Fifth Circuit appears in Appendix A, page A-8, and is reported in 605 F.2d 893 (5th Cir. 1979).

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

1. This action was instituted by the Appellant in the United States District Court for the Eastern District of Louisiana under 28 USC §1331 (Federal Question), §1343 (Civil Rights), 2201-02 (Declaratory Judgment), and under Title 42 USC §1981 (Civil Rights) and Title 42 USC §2000(e) et seq. (Civil Rights), to enjoin the implementation and enforcement of a Consent Order entered into in *Faggen, et al v. New Orleans Public Service, et al,* Civil Action No. 70-2946, which adversely affect Appellant's "seniority rights" as a bus driver with the Appellee, New Orleans Public Service, Inc., and for a declaration of the unconstitutionality of said provisions of the Consent Order under Title 42 §2000(e) et seq. and Title 42 USC §1981.

2. Additionally, Appellant, Glenn Hefner, requested that the provisions of the Consent Order in *Faggen, supra,* with regard to "seniority rights" be rescinded for the reasons that said provisions were (1) inequitable and contrary to law, (2) Appellant, Hefner, was not a party to the action upon which the Consent Order was founded nor informed of the provisions of the Consent Order along with other members of the Union, and (3) that the provisions of the Consent Order with regard to "seniority rights" constituted "racial discrimination" against Appellant, Hefner and other white bus drivers.

3. The Appellees, New Orleans Public Service, Inc., The Co-Operative Street Railways Employees Assn. of New Orleans and the Amalgamated Transit Union, Division No. 1560, filed a Motion to Dismiss the Complaint under Rule 12(b) of the Federal Rules of Civil Procedure which was granted by the District Court on March 10, 1977, thereby dismissing Appellant's Complaint.

4. A Notice of Appeal to the United States Court of Appeals for the Fifth Circuit was filed in the United States District Court for the Eastern District of Louisiana on March 22, 1977. (See Appendix A, page A-21).

5. The United States Court of Appeals for the Fifth Circuit filed an opinion on November 1, 1979, after receiving briefs and oral arguments, affirming the Judgment of the United States District Court for the Eastern District of Louisiana dismissing Appellant's Complaint.

6. A Notice of Appeal to this Court from the Judgment of the United States Court of Appeals for the Fifth Circuit was filed on November 14, 1979. (See Appendix A, page A-23).

7. The jurisdiction of this Court to review the decision of the United States Court of Appeals for the Fifth Circuit is conferred by 28 USC §1254.

QUESTIONS PRESENTED BY THE APPEAL

The following questions are presented by this Appeal:

1. Did the Appellant, Glenn Hefner, timely file suit under Title 42 USC §2000(e) et seq., within ninety (90) days after receipt of his "Right To Sue Notice" thereby satisfying the jurisdictional prerequisites to maintain his Title VII action?

2. Did the Appellant, Glenn Hefner, timely file suit under Title 42 USC §1981?

3. Do the seniority provisions of the Consent Order entered into on March 8, 1974, in *Faggen, et al v. New Orleans Public Service, Inc., et al.*, Civil Action No. 70-2946(D) E.D.La., violate Title 42 USC §2000(e) et seq., and Title 42 USC §1981 in that said seniority provisions discriminate against white bus drivers by awarding retroactive seniority past the effective date of the 1964 Civil Rights Act in contravention of this Court's mandate in *International Brotherhood of Teamsters v. United States, et al.; T.I.M.E.-D.C., Inc. v. United States, et al*, 431 US 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977)?

STATEMENT OF THE FACTS OF THE CASE

In 1970, black employees in the Transit Department of the New Orleans Public Service, Inc., (N.O.P.S.I.) instituted a class action suit under Title VII of the 1964 Civil Rights Act, Title 42 USC §2000(e) et seq., and Title 42 USC §1981, against N.O.P.S.I. and the Co-Operative Street Railway Employees Assn. of New Orleans, the collective bargaining agent for the bus drivers. In this suit, the black employees of the Transit Department alleged racial discrimination in the hiring and employment practices of N.O.P.S.I. The suit, entitled

Faggen, et al v. New Orleans Public Service, Inc., et al, Civil Action No. 70-2946(D) E.D. of Louisiana was settled by a Consent Order entered into on March 8, 1974. (That portion of the Consent Order regarding seniority rights is listed in Appendix A, page A-25.)

Although the hiring of transit employees was exclusively within the domain of the New Orleans Public Service, Inc., and membership in the Association was not mandatory, the Co-Operative Street Railway Employees Association of New Orleans was sued as a Defendant in the *Faggen* litigation. At this time the Association represented both black and white bus drivers in proportion to the number of black and white operators hired by New Orleans Public Service, Inc. The Association was represented in the *Faggen* litigation by its Board of Trustees.

The Consent Order of March 8, 1974, was signed by the attorneys for the Plaintiffs, New Orleans Public Service, Inc., and the Co-Operative Street Railway Employees Association of New Orleans, although the terms of the Consent Order were never presented for their consent or approval. The Consent Order specifically provided for the merger of seniority lists of all black employees and all white employees into a single "pick-list", to be used by the New Orleans Public Service, Inc., to determine priority in the bus operators' selection of runs and vacation time. The new "pick-list" was to consist of the most senior white operator, followed by the most senior black operator, then the second most senior white operator, followed by the second most senior black operator, and so on, alternating white and black until the two previously separate lists were exhausted.

After the signing of the Consent Order on March 8, 1974, it was subsequently incorporated in the collective bargaining agreement between N.O.P.S.I. and the Association. The Co-Operative Railway Employees Association of New Orleans was shortly thereafter replaced by the Almagated Transit Union, Division 1560, as the bargaining agent for the bus operators. The Consent Order has been incorporated into the collective bargaining agreement between N.O.P.S.I. and the Almagated Transit Union, Division 1560 each year from 1974 to the present date.

The Appellant, Glenn Hefner, upon learning of the seniority provisions of the Consent Order on March 7, 1974, filed a charge of employment discrimination with the Equal Opportunity Commission alleging that the terms of the Consent Order in *Faggen, supra,* unlawfully and illegally discriminated against him and all other white bus operators by depriving them of vested seniority rights which he and others had acquired over the many years of service with the New Orleans Public Service, Inc. (See Appellant's Charge, Appendix A, page A-27). The Appellant, himself, was hired on May 13, 1963, and had approximately eleven (11) years of seniority with N.O.P.S.I. at the time the Consent Order was signed.

On May 6, 1974, certain white members of the Co-Operative Street Railway Employees Association of New Orleans filed a Motion to vacate and set aside the Consent Order because of the seniority provisions contained therein. The District Court denied their Motion on May 11, 1974, because the Movers were not "a party" to the *Faggen* litigation

and could not avail themselves to the provisions of Rule 60(b) of the Federal Rules of Civil Procedure. (See Appendix A, page A-30).

On May 22, 1974, the Appellant, Glenn Hefner, received a letter form Glenn P. Clasen, District Director of the Equal Employment Opportunity Commission for the New Orleans District Office, (see Appendix A, page A-32), which neither advised Appellant of his right to litigate his cause of action in the Federal District Court nor of the ninety (90) day period for filing his civil action. Appellant did indicate that he called the Equal Employment Opportunity Commission shortly after receiving the May 22, 1974, letter and was advised by some unknown personnel that he would receive a "Notice of Right To Sue".

On March 11, 1976, the Equal Employment Opportunity Commission sent Mr. Hefner a "follow-up return" which the Appellant completed and sent back to the Commission on the following day on March 12, 1976. (See, Appendix A, pages A-33 and A-34).

On March 30, 1976, the Equal Employment Opportunity Commission issued the Appellant a "Notice Of Right To Sue", (See, Appendix A, page A-35).

The Appellant, Glenn Hefner, filed suit in the United States District Court for the Eastern District of Louisiana on June 25, 1976, alleging the seniority provisions of the Consent Order in *Faggen, supra,* violated Title USC § 2000(e) et seq., and Title 42 USC § 1981, all within the ninety (90) day period.

The Appellees in the instant suit, New Orleans Public Service, Inc., and the Amalgamated Transit Union, Division No. 1560, filed Motions to Dismiss and/o. for Summary Judgment, which Motions were granted by the District Court on March 10, 1977, dismissing Appellent's suit.

Appellant filed his appeal in the United States Court of Appeals for the Fifth Circuit which affirmed the judgment of the District Court for different reasons, namely, that Appellant Hefner's, suit was untimely filed under 42 USC §2000(e) et seq., and that his claim under 42 USC §1981 was barred by laches. (See, Appendix A, page A-8, opinion of Fifth Circuit dated November 1, 1979, reported at 605 F.2d 893).

From the Judgment of the Fifth Circuit Court of Appeals affirming the dismissal of Appellant's suit, the instant Application for Writ of Certiorari is filed.

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

A. THE APPELLANT, GLENN HEFNER, MET THE JURISDICTIONAL REQUIREMENTS OF TITLE 42 USC §2000(e) ET SEQ., BY FILING SUIT WITHIN NINETY (90) DAYS FROM THE ISSUANCE OF HIS "NOTICE OF RIGHT TO SUE".

The decision of the United States Court of Appeals for the Fifth Circuit which held the Appellant's suit under Title 42 §2000(e) et seq., of the 1964 Civil Rights Act to be untimely, clearly contravenes the weight of judicial authority in this country with regard to the jurisdictional requirement mandated

by Title VII of the 1964 Civil Rights Act. In so holding, the Fifth Circuit Court of Appeals concluded that the May 22, 1974, letter from the Equal Employment Opportunity Commission to the Appellant, was adequate and started the running of the ninety (90) day period in which the Appellant could litigate his cause of action in the United States District Court.

This conclusion was reached by the Court of Appeals for the Fifth Circuit despite the fact that the May 22, 1974, letter did not include any notice that the Appellant could file suit in the United States District Court and that he had ninety (90) days in which to do so.

The statutory provisions involved is Title 42 USC §2000 (e)-5(f)(1) and it provides in pertinent part:

> . . . (i)f a charge filed with the Commission . . . is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action under this section . . . or the Commission had not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . , shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved.

The Equal Employment Opportunity Commission, in the past, used a two letter procedure in administering this section of Title VII of the Civil Rights Act of 1964. The first step would be to send a letter informing the Complainant either that his charge had been dismissed, his file administratively

closed or that conciliation efforts had failed. This first letter would also inform the Complainant that a second letter (referred to as a Notice of Right To Sue) would be issued upon his request or his attorney's and, upon receipt of this Notice of Right To Sue, the Complainant would have ninety (90) days in which to file suit.

The May 22, 1974, letter only informed Appellant that his file was "administratively closed" and erroneously informed Appellant that the Commission was without jurisdiction to act on his complaint. Nowhere in the letter did the Commission advise Appellant of his right to file a separate cause of action in the United States District Court or that he had ninety (90) days in which to do so. Rather, the letter went on to state that Appellant should request a hearing on the Order or appeal the Order to the United States Court of Appeals for the Fifth Circuit. The Commission did not advise Appellant as to any rights of intervention, and it should be noted that only eleven (11) days prior to this letter the District Court denied a Motion for Relief from Judgment filed by white bus drivers on the grounds that these white bus drivers were not "parties" to the *Faggen* litigation and could not avail themselves to Rule 60(b) of the Federal Rules of Civil Procedure. This fact was known to the Appellant, Hefner, at the time he received the May 22, 1974, letter from the Commission.

At the time Appellant received the May 22, 1974, letter he did not have retained counsel. The Equal Employment Opportunity Act is a remedial statute which is to be liberally construed in favor of the victims of discrimination. The broad structure and purpose of Title VII, as established by Congress,

relies upon laymen, operating without legal assistance, to initiate both administrative complaints and lawsuits. Congress did not intend that such laymen, not schooled in the finer points of legal procedure, be presumed to know exactly what procedural step they must next take in order to perfect their claims, especially when they have been conclusively told that they have no further rights or remedies. (See, *Mahroom v. Hook*, 563 F.2d 1369 (9th Cir., 1977); *Davis v. Valley Dist. Company*, 522 F.2d 827 (9th Cir., 1974); *E.E.O.C. v. Wah Chang Albany Corporation*, 499 F.2d 187 (9th Cir., 1974) and *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir., 1970)).

The unanimity of jurisprudence around the Circuits hold that the aggrieved person must receive actual and effective notification of his right to sue. See, *Lynn v. Western Gillette*, 564 F.2d 1282 (9th Cir., 1977); *Tuft v. McDonnell Douglas Corporation*, 517 F.2d 1301 (8th Cir., 1975); *Lacy v. Chrysler Corporation*, 533 F.2d 353 en banc, (8th Cir., 1976), cert. denied, 429 US 959 S.Ct. 381, 50 L.Ed. 2d 325; *Coles v. Penny*, 174 US App. D.C. 277, 531 F.2d 609 (1976); *Garner v. E. I. DuPont DeNemours & Company*, 538 F.2d 611 (4th Cir. 1976); *Williams v. Southern U. Gas Company*, 529 F.2d 483 (10th Cir., 1976) cert. denied, 429 US 959, 97 S.Ct. 381, 50 L.Ed.2d 325; *Weaver v. Joseph Schlitz Brewing Company*, 551 F.2d 122 (6th Cir. 1977).

Additionally, in March of 1974, the following procedure, with regard to notification of an aggeieved person, was mandated by 29 C.F.R. §1601.25:

Procedure After Failure Of Conciliation

§1601.25. Notice to respondent, person filing a charge on behalf of the aggrieved person and aggrieved person.

(a) In any instance in which the Commission is unable to obtain voluntary compliance as provided by Title VII, as amended, it shall so notify the respondent, the person filing a charge on behalf of the aggeieved person, the aggrieved person or persons, and any State or local agency to which the charge has been previously deferred pursuant to §1601.12 or §1601.10. Notification to the aggrieved person shall include:

(1) A copy of the charge.

(2) A copy of the Commission's reasonable cause or no reasonable cause determination as appropriate.

(3) *Advice concerning his or her rights to proceed in court under Section 709(f)(1) of Title VII.*

(b) The Commission hereby delegates to its District Directors, Deputy District Directors, and the Director of Compliance, the authority to issue Notices of Right-To-Sue on behalf of the Commission in all cases except those in which a government, governmental agency or political subdivision is named in the charge, pursuant to the procedures set forth in paragraph (a)(2) and (3) of this section.

Considering the above notice requirements, and considering the clear and concise language of §706(f) that , "the Commission . . . shall so notify the person aggrieved. . .", the Appellant in the instant case did not receive notification in the May 22, 1974,

letter which advised him that his file was administratively closed but failed to advise him of his right to bring a civil action in the District Court within ninety (90) days.

The Court of Appeals indicated in footnote 7 of their opinion that there was no evidence in the record indicating when Hefner made a request for his Notice Of Right To Sue, or that he had ever made one. In Appendix A, pages A-33 and A-34, which are listed on page 115 and 116 of Volume I of the record below, are the "follow-up return" forms which indicate the Commission sent Hefner such a form on March 11, 1976, and was returned by Hefner to the Commission on March 12, 1976, with the appropriate box checked indicating Hefner desired the Commission's assistance in obtaining an attorney to further pursue his charge. Some eighteen (18) days later on March 30, 1976, the Commission issued Hefner his "Notice Of Right To Sue". (See, Appendix A, page A-35).

Notification to the aggrieved person initiates the running of the ninety (90) day limitation period. *Alexander v. Gardner-Denver Co.*, 415 U. S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974); *McDonnell Douglas Corp. v. Green,* 411 U. S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Plunkett v. Roadway Express, Inc.*, 504 F.2d 417 (10th Cir., 1974); *Franks v. Bowman Transporation Co.*, 495 F.2d 398 (5th Cir. 1974). These cases make clear that the aggrieved person must receive actual and effective notification of his right to sue. Even the Fifth Circuit in *Franks v. Bowman, supra,* noted the following:

> In terms of the policy behind limitations periods generally, the claimant can hardly be said to have slept on his rights if he allows the thirty-day period to expire in ignorance of his right to sue. (Id. at 404).

It is also clear from the record below that the Equal Employment Opportunity Commission's failure to so notify the Appellant, Hefner, of his right to bring a civil action in the District Court and that such suit must be brought within ninety (90) days prejudiced Hefner as much as one could be prejudiced, i.e., the barring of Hefner's suit because of time limitations.

Certainly equity demands that the Appellant not be penalized for any errors or ommissions of the Equal Employment Opportunity Commission. See, *E. E. O. C. v. Kemberly-Clark Corp., supra,* 511 F.2d at 1360; *Choate v. Caterpillar Tractor Co.,* 402 F.2d 357, 360 (7th Cir. 1968); see also, *Love v. Pullman,* 404 U.S. 522, 526-27, 92 S.Ct. 616, 30 L.Ed. 2d 679 (1972); *E.E.O.C. v. Wah Chang Albany Corp.,* 499 F.2d 1003 (8th Cir. 1973); Note, *Violations by Agencies of Their Own Regulations,* 87 Harv. L.Rev. 629, 631 (1974).

Since the letter of May 22, 1974, did not give the Appellant any effective notification that he could bring a civil action in the District Court within ninety (90) days, it cannot serve to initiate the running of the statute of limitations. Clearly, the "Notice Of Right To Sue" received by Hefner on March 30, 1976, initiated the running of the ninety (90) day period and the Appellant's suit was brought within that ninety (90) day period and was timely filed. The judgment of the Court of Appeals for the Fifth Circuit should be reversed for the reasons set forth above.

B. THE APPELLANT'S SUIT UNDER TITLE 42 USC §1981 WAS NOT UNTIMELY AND WAS NOT BARRED BY THE STATUTE OF LIMITATIONS.

Article 3544 of the Louisiana Civil Code specifically provides the statute of limitations to be applied in the instant case as follows:

> Article 3544. Personal actions, general rule
>
> In general, all personal actions except those before enumerated, are prescribed by ten years.

Title 42 USC §1981 contains no limitation period, and therefore, the Federal Court is required to apply the statute of limitations of the State statute of limitations which would be applicable to the most analogous State action. As noted by the Court in *Hines v. Olinkraft, Inc.,* 413 F. Supp. 1360 (1975):

> Regarding Plaintiff's claim for back pay, the applicable Louisiana prescriptive period is one year. La. Civ. Code Art. 3534. *Notwithstanding that, the claims for declaratory and injunctive relief are controlled by the residuary prescriptive period of ten years. La. Civ.Code 3544;* Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011, 1017 at n.16 (5th Cir., 1971); Johnson v. Goodyear Tire and Rubber Company, 491 F.2d 1364, 1378 at n.48 (5th Cir., 1974); Guerra v. Manchester Terminal Corp., 498 F.2d 641, 647 (5th Cir., 1974); Smith v. Olinkraft, Inc., 404 F.Supp. 861 (W.D.La., 1975).(Emphasis ours.)

The prescriptive period clearly has not run against the Appellant's claim for declaratory and injunctive relief prayed for under Title 42 USC §1981. The Court of Appeal's ruling in the instant case conflicts with its own precedent on this par-

ticular issue. Hefner specifically requested declaratory and injunctive relief as to the legality and enforcement of the seniority provisions of the *Faggen* Consent Order and their incorporation in the collective bargaining agreement between New Orleans Public Service, Inc., and the Amalgamated Transit Union, Division No. 1560. The dismissal of Appellant's §1981 claim as being time-barred is error.

C. THE SENIORITY PROVISIONS OF THE CONSENT ORDER ENTERED INTO ON MARCH 8, 1974, IN *FAGGEN, ET AL v. NEW ORLEANS PUBLIC SERVICE, INC., ET AL,* C.A. NO. 70-2946 (D) AND THEIR SUBSEQUENT INCORPORATION INTO THE CONTRACT AGREEMENT BETWEEN THE NEW ORLEANS PUBLIC SERVICE, INC., AND THE AMALGAMATED TRANSIT UNION, DIVISION NO. 1560, VIOLATES TITLE 42 USC §2000(e) ET SEQ., AND TITLE 42 USC §1981.

The pertinent part of the *Faggen* Consent Order with regard to seniority rights is found in Appendix A, page A-25. The onerous effects of these provisions of the *Faggen* Consent Order can best be understood in their application in the instant case. Under these provisions, the most senior black operator with approximately twelve (12) years of seniority, now picks his bus run and his vacation time ahead of the most senior white operator with approximately thirty-four (34) years of service. In several instances, white operators pick their bus runs and vacation times behind black operators who were not yet born at the time the white operators began working for the New Orleans Public Service, Inc. The injustice and inequity of the Consent Order mandates relief by this Court,

for neither under the "rightful place" doctrine nor under the "make whole objective" of the Act, can these provisions of the *Faggen* Consent Order be left to stand.

Title VII of the Civil Rights Act of 1964 specifically prohibits discrimination in employment against anyone on the basis of race. Title 42 USC §2000(e)-2(a) prohibits an employer from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national orgin". Section 2000(e)-2 makes no exception for reverse discrimination against white employees. In fact, the categorical prohibition of any racial discrimination establishes that Title VII prohibits discrimination against white workers as well as minority workers. *McDonald v. Sante Fe Trail Transporation,* 427 U.S. 273, 96 S.Ct. 2574 (1976).

In addition to the Supreme Court's ruling in *McDonald, supra,* several circuits have indicated that departures from plant-wide seniority systems to favor minority employees also violate Title VII of the Civil Rights Act of 1964. See, *Jersey Central Power & Light Co., v. Local Union 327, et al.,* 508 F.2d 687, (3rd Cir., 1975); *Waters v. Wisconsin Steel Works of International Harvester Company, et al,* 502 F.2d 1309 (7th Cir. 1974); *Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC v. United States,* 416 F.2d 980 (5th Cir. 1969); and, *Patterson v. The American Tobacco Co.,* 535 F.2d 257 (4th Cir. 1976).

In *Jersey Central Power & Light Co., v. Local Union 327, et al., supra,* the Third Circu reversed a district court

decision requiring workers to be laid off according to the percentage of workers of their race employed by the company, rather than in the reverse order of seniority. In so holding the Court stated:

> Congress, while recognizing that a bona fide seniority system might well perpetuate past discriminatory practices, nevertheless chose between upsetting all collective bargaining agreements with such provisions and permitting them despite the perpetuating effect that they might have. We believe that Congress intended a plant-wide seniority system, facially neutral but having a disproportionate impact on female and minority group workers, to be a bona fide seniority system within the meaning of § 703(h) of the Act.

In *Waters v. Wisconsis Steel Works of International Harvester Co., supra,* the Seventh Circuit specially held that the "last hired - first fired" seniority system did not violate Title VII, even if it disproportionately affected minority employees, and stated thusly:

> Title VII mandates that workers of every race be treated equally according to their earned seniority. It does not require, as the Fifth Circuit said, that a worker be granted fictional seniority or special privileges because of his race.

The Court in *Waters, supra,* further stated that discrimination against white employees to advance minorities is illegal, stating that:

> Title VII speaks only to the future. Its backward gaze is found only on a present practice which may perpetuate past discrimination. An employment seniority system embodying the "last hired, first fired" principle does not in itself perpetuate past discrimination. To hold otherwise would be tantamoune to shackling white employees with a burden of a past discrimination created not by them but by their employer. Title VII was not designated to nurture such reverse discriminatory preferences. Griggs v. Duke Power Co., 401 U.S. 424, 430-431, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)."

In *Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC v. United States,* 416 F.2d 890 (5th Cir., 1969), this Court struck down a job seniority plan which discriminated against minority workers, but sanctioned the mill seniority, specifically indicating that Congress intended to prevent "reverse discrimination", stating thusly:

> No doubt, Congress, to prevent "reverse discrimination" meant to protect certain seniority rights that could not have existed but for previous racial discrimination. For example, a Negro who had been rejected by an employer on racial grounds before passage of the Act could not, after being hired, claim to outrank whites who had been hired before him but after his original rejection, even though the Negro might have had senior status but for the past discrimination. As the court pointed out in *Quarles,* the treatment of "job" or "department seniority" raises problems different from those discussed in the Senate debates: "a department seniority system that has its genesis in racial discrimination is not a bona fide seniority system.
>
> It is one thing for legislation to require the creation of *fictional* seniority for newly hired Negros, and quite another thing for it to require that time *actually worked* in Negro jobs be given equal status with time worked in white jobs. To begin with, requiring employers to correct their pre-Act discrimination by creating fictional seniority for new

> Negro employees would not necessarily aid the actual victims of the previous discrimination. There would be no guarantee that the new employees had actually suffered exclusion at the hands of the employer in the past, or, if they had, there would be no way of knowing whether, after being hired, they would have continued to work for the same employer. In other words, creating fictional employment time for newly hired Negros would comprise preferential rather than remedial treatment. The clear thrust of the Senate debate is directed against such preferential treatment on the basis of race . . .

In *Patterson v. The American Tobacco Company,* 535 F.2d 257 (4th Cir. 1976), the Fourth Circuit reversed a lower court decision permitting black and female employees to "bump" white male employees to remedy past race and sex discrimination. In so holding the Court stated:

> One of the early questions about the construction of Title VII was whether "present consequences of past discrimination are covered by the Act," Quarles v. Phillip Morris, Inc., 279 F.Supp. 505 (USDC Eva. 1968). The generally accepted answer is a qualified "yes". On the other hand, Title VII has not been construed to impose a duty to demote incumbents. Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980, (C.A. 5 1969). Every appellate court to whom the issue has been presented has accepted this interpretation, and Congress, when considering the 1972 amendments to Title VII, approvingly noted Papermakers' construction of the Act.
>
> Enactment of Title VII was the result of many concessions, including the unequivocal assertion by proponents that it was not intended to be used to displace incumbent workers. See Clark-Case memorandum at 110 Cong. Rec. 6992 (daily ed. April 8, 1964). Demoting employees, especially

> those who are not responsible for wrongdoing, undoubtedly would encounter more resistance than deferring future expectancies. Bumping is an unsettling process and its effect adversely affects employees who have done no wrong and who, indeed, may have been victims of discrimination.
>
> Compensatory pay and adjustment of benefits provide monetary relief for discrimination against minority employees but do not afford the satisfaction that comes from being promoted to a more responsible job. Nevertheless, such an intangible benefit does not justify injunctive relief mandating bumping. Weighed against the minority employee's sense of achievement are the harm that demotion will cause to incumbents who have done no wrong and the disruption of the company's business that bumping entails. Full monetary compensation and removal of barriers to employees without disruption to other employees and management.

Finally, this Court in *International Brotherhood of Teamsters v. United States, et al* and *T.I.M.E.-D.C., Inc. v. United States, et al.,* 431 US 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) specifically limited retroactive seniority awards to employees who suffered pre-Act discrimination in those cases where the seniority system was "bona fide", even though such a seniority system might perpetuate past discrimination. In so holding this Court discussed at length the primary purpose of Title VII and its application to seniority systems which perpetuated past discrimination. In its decision this Court held:

> Were it not for § 703(h), the seniority system in this case would seem to fall under the Griggs rationale. The heart of the system is its allocation of the choicest jobs, the greatest protection against layoffs, and other advantages to those employees who have

been line drivers for the longest time. Where, because of the employer's prior intentional discrimination, the line drivers with the longest tenure are without exception white, the advantages of the seniority system flow disproportionately to them and away from Negro and Spanish-sur-named employees who might by now have enjoined those advantages had not the employer discriminated before the passage of the Act. This disproportionate distribution of advantages doe in a very real sense "operate to 'freeze' the status quo of prior discriminatory employment practices." Ibid. But both the literal terms of § 703(h) and the legislative history of Title VII demonstrate that Congress considered this very effect of many seniority systems and extended a measure of immunity to them.

In sum, the unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII. As the legislative history shows, this was the intended result even where the employer's pre-Act discrimination resulted in whites having greater existing seniority rights than Negros. Although a seniority system inevitably tends to perpetuate the effects of pre-Act discrimination in such cases, the Congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act.

To be sure, § 703(h) does not immunize all seniority systems. It refers only to 'bona fide' systems, and a proviso requires that any differences in treatment not be 'the result of an intention to discriminate because of race . . . or national origin . . . '. But our reading of the legislative history compels us to reject the Government's broad argument that no seniority system that tends to perpetuate pre-Act

discrimination can be 'bona fide'. To accept the argument would require us to hold that a seniority system becomes illegal simply because it allows the full exercise of the pre-Act seniority rights of employees of a company that discriminated before Title VII was enacted. It would place an affirmative obligation on the parties to the seniority agreement to subordinate those rights in favor of the claims of pre-Act discriminatees without seniority. The consequence would be a perversion of the Congressional purpose. We can not accept the invitation to disembowel § 703(h) by reading the words 'bona fide' as the Government would have us do. Accordingly, we hold that an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination. Congress did not intend to make it illegal for employees with vested seniority rights to continue to exercise those rights, even at the expense of pre-Act discriminatees.

In the instant case, the seniority system employed by the New Orleans Public Service, Inc., prior to the *Faggen* Consent Order, was clearly a "bona fide" seniority system within the protection of § 703(h) of Title VII since it was based entirely on a bus operator's length of service with the company. It consisted of the most senior operator having first choice of his bus run and vacation time and was not based on an intention to discriminate because of race.

As noted by this Court in the *Teamsters* case, *supra:*

> Our conclusion that the seniority system does not violate Title VII will necessarily affect the remedy granted to individual employees on remand of this litigation to the District Court. Those employees who suffered only pre-Act discrimination

> are not entitled to relief, and no person may be given seniority to a date earlier than the effective date of the Act.

It is clear from a reading of the seniority provisions contained in the *Faggen* Consent Order, that fictional retroactive seniority was given to all black bus operators hired on or before November 29, 1971, regardless of any claim of discrimination. In every case, the seniority awarded to the black operators went beyond the effective date of the Civil Rights Act of 1964, thereby contravening the mandate of this Court in *Teamsters, supra.*

One who analyzes this particular case must come to the inescapable conclusion that the New Orleans Public Service, Inc., which allegedly discriminated in the hiring of black bus operators prior to 1964, managed to escape this major Title VII litigation, unscathed, by entering into the *Faggen* Consent Order which resulted in white bus operators losing their vested seniority rights to black bus operators, ultimately, paying *the price* for the many years that the New Orleans Public Service, Inc., discriminated against blacks in their hiring practices. Both equity and justice mandate that the *Faggen* Consent Order be declared illegal and unconstitutional under both Title 42 USC § 2000(e) et seq., and Title 42 USC § 1981.

CONCLUSION

For the foregoing reasons, Appellant, Glenn N. Hefner, respectfully urges that the judgment of the United States Court of Appeals for the Fifth Circuit be reversed and remanded, and that the seniority provisions of the *Faggen* Consent Order which has been incorporated in the collective bargaining agreement between New Orleans Public Service, Inc., and the Amalgamated Transit Union, Division No. 1560 be declared illegal and unconstitutional in violation of Title 42 USC § 2000(e) et seq., of Title VII of the Civil Rights Act of 1964 and Title 42 USC § 1981.

Respectfully submitted:

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I certify that copies of the foregoing Jurisdictional Statement were mailed this 24th day of January, 1980, postage pre-paid, to the following counsel of record:

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APPENDIX "A"

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

GLENN N. HEFNER, ETC.

VERSUS

NEW ORLEANS PUBLIC SERVICE, INC., ET AL

NO. 76-1918
CIVIL ACTION
SECTION D

MEMORANDUM OPINION AND ORDER

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BOYLE, District Judge:

In 1970, black employees in the Transit Department of New Orleans Public Service, Inc. (hereinafter "NOPSI") instituted a class action in this court against their employer and Co-operative Street Railway Employees Association of New Orleans (hereinafter "Co-operative"), which at the time was the collective bargaining agent for the company's car and bus operators. *See, Faggen, et al v. New Orleans Public Service, Inc.*, et al, C.A. No. 70-2946(D). They alleged the defendants had engaged in recially discriminatory employment practices violative of Title VII and 42 U.S.C. s 1981. The litigation terminated with our entry of a consent order on March 8, 1974, providing - *inter alia* - for a merger of the seniority lists of black and white employees into a single "pick list," used by NOPSI to determine priority in the operators' selection of both runs and vacation time. The new list was to consist of the most senior white operator, followed by the most senior black operator, then the second-most senior white and black until the two previously separate lists were exhausted. *See* Faggen Consent Order of 3/8/74, at p. 11, att'd to NOPSI Motion to Dismiss/for Summary Judgment [Record Doc. #5].

Plaintiff in the instant suit, a white operator employed in the NOPSI Transit Department for the past 13 years, proceeds against NOPSI, Co-operative and the Amalgamated Transit Union, Division No. 1560 (hereinafter "Amalgamated"), the latter union in March of 1974 having succeeded Co-operative as the bargaining agent for NOPSI operators. Hefner complains that the incorporation of the terms of the *Faggen*

consent decree - specifically those regarding the merged "pick list" - into the collective bargaining agreement executed between NOPSI and Amalgamated, dilutes his and other white operators' seniority rights by giving higher priority to less-senior black employees in the selection of runs and vacation time. He claims that this constitutes a racially discriminatory employment practice prohibited under Title VII and 42 U.S.C. s 1981. The matter is brought as a class action on behalf of

> all other bus and one-man car operators employed in the Transit Department of [NOPSI], who are members of [Amalgamated] and who have been discriminated against and deprived of "seniority rights" because they are white.

See Amended Complaint, ¶ 3 [Record Doc. #19]. [1]

Dispositive motions have been filed by all defendants. NOPSI moves to dismiss for the lack of subject matter jurisdiction and for the failure to state a claim upon which relief can be granted, and also for summary judgment in its favor. Amalgamated and Co-operative each moves to dismiss for failure to state a claim and also for summary judgment. Following oral argument, we took the motions under submission; and now, having considered the memoranda of counsel and the evidence in the record, we hold for the defendants.

---

1. No motion to maintain a class action has been urged by plaintiff as of yet, although his complaint was filed on June 25, 1976 and the local rules of this court require that such a motion be made within 90 days of the bringing of a class action. *See* Rule 2.12c, General Rules of the U.S. District Court (E.D. La.).

At the outset, we rejected as patently without merit the argument of NOPSI that our jurisdiction over the subject matter of the Title VII cause of action is lacking. Defendant correctly observes that the Equal Employment Opportunity Commission (EEOC) found, in light of the *Faggen* consent order, that it had no jurisdiction to investigate plaintiff's claim of employment discrimination filed on March 7, 1974, and further notes that Helfner failed to bring this suit within 90 days of that decision and failed to intervene during the pendency of the *Faggen* litigation. *See* NOPSI Supplemental Motion to Dismiss/ for Summary Judgment [Record Doc. #15]. But this court is not divested of jurisdiction by the finding of an administrative agency that it could not proceed with its investigation. Moreover, although the EEOC so decided in May of 1974, it did not issue a right-to-sue letter to plaintiff until March 30, 1976, and this action was brought within 90 days thereof, as Title VII requires. See 42 U.S.C. § 2000e-5(f)(1). Finally, whatever relevance Hefner's failure to intervene in *Faggen* may have to other issues discussed herein, [2] it is of no jurisdictional import in this proceeding.

Moving to consideration of defendants' motions for summary judgment, [3] we also may reject at the outset plaintiff's attempt during oral argument to attack the decree in the

---

2. See p. 6 *infra*.

3. Inasmuch as the motions to dismiss for plaintiff's failure to state a claim direct our attention to matters outside the pleadings, they are to be treated the same as the alternative motions under Federal Rule of Civil Procedure 56. *See* Rule 12(b), F.R.Civ.Pro.

Faggen litigation on the ground he was not joined as an indispensable party therein pursuant to Rule 19 of the federal rules. [4] The function of Rule 19 is to promote the full and just adjudication of an ongoing controversy by either joining all interested parties before the court, if feasible, or by terminating the action, if not. *See* Rule 19(a)&(b), F.R.Civ.Pro. Accordingly, objection to the failure to join an indispensable party is preserved during trial on the merits only. *See* Rule 12(h)(2), F.R.Civ.Pro. [5] Plaintiff's contention that he was an indispensable party in a lawsuit completed some three years ago, therefore, is one which is not only out of place in this - a separate - action, but also is clearly out of time. It appears as a matter of record that Hefner was cognizant of the terms of the proposed settlement of the *Faggen* case during actual pendency of that matter, [6] but nevertheless failed to seek intervention

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4. Both in his memorandum opposing the instant motion by NOPSI and in an amended complaint, plaintiff also sought to invoke Rule 60(b) as a basis for seeking relief from the *Faggen* consent order. *See* Plaintiff's Opp. Mem. [Record Doc. #9]; Amended Compl. [Record Doc. #19]. He now concedes that this rule can afford him no relief. We thus consider this erstwhile claim properly abandoned.

5. Despite the apparently clear indication in Rule 12(h)(2) that the defense is waived unless presented at trial, indispensability in some instances has been entertained as an issue for the first time on appeal. *See* Wright & Miller, Federal Practice and Procedure: Civil § 1392.

6. The *Faggen* decree was entered on March 8, 1974. One day prior thereto, on March 7, plaintiff filed his aforementioned EEOC charge, in which he complained of racial discrimination by virtue of the rearranged "pick list." *See* Plaintiff's EEOC Charge of 3/3/74, att'd to NOPSI.

and/or raise the issues of his indispensability. He can hardly be heard to do so now. [7]

The question, then, becomes whether a white employee may prevail in an independent action under Title VII and section 1981, when his claim for such is based solely upon the adverse impact of seniority relief awarded black co-workers in an earlier Title VII proceeding. Statutory and jurisprudential authority compels a negative response.

As was recently re-affirmed by the Supreme Court, the award of seniority rights under Title VII is to be viewed in light of the "make-whole" objective of the Act. *See Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 96 S.Ct. 1251, 1263-67, 47 L.Ed.2d 444 (1976). More pertinent to the matter at hand, the Court in *Franks* recognized that such an award to black employees may necessarily diminish the interests and expectations of other (white) employees, but that the purpose of Title VII would be frustrated by precluding "rightful place" relief solely on this basis. *See id.* at 1269. The Fifth Circuit likewise has noted that the fashioning of a Title VII remedy for black employees in some instances will entail action detrimental to the competing interests of white co-employees. *See Gamble v. Birmingham Southern Railroad Co.*, 514 F.2d 678, 685 (5 Cir. 1975); *Vogler v. McCarthy, Inc.*, 451 F.2d 1236, 1238-39 (5 Cir. 1971).

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7. We intimate no view as to the merits of a timely argument that white employees should be joined under Rule 19 in a Title VII/ s 1981 class action by black employees against a company and union, when the seniority rights of such white workers may be affected by an award in plaintiffs' favor. *See* English v. Seaboard Coast Line Railroad Co., 465 F.2d 43 (5 Cir. 1972).

This is not to say that an employer's "reverse discrimination" against white workers can never be actionable under Title VII, or that the equitable power of the courts to make black employees whole is unlimited. Although the instant case raises no such question, for example, it is not within the parameters of the "rightful place" theory to bump white incumbent workers out of their present opsitions. *See Gamble v. Birmingham Southern Railroad Co.*, supra, at 685; *Local 189, United Papermak. & Paperwork. v. United States*, 416 F.2d 980, 988 (5 Cir. 1969). But, just as the objection Hefner raises would not have been sufficient in the context of the *Faggen* litigation to prevent the granting of "rightful place" relief to black operators *via* merger of the seniority lists, it is clear that his attempt to now challenge such relief in an independent Title VII action also must fail. Any other result would contradict the established remedial principles of the Act.

Regarding the separate cause of action plaintiff urges under 42 U.S.C. s 1981, dismissal similarly is appropriate. This section confers no actionable rights upon white persons. *See McDonald v. Santa Fe Trail Transportation Co.*, 513 F.2d 90 (5 Cir. 1975).

No fact issues appear herein to prevent our resolution of the aforementioned issues as a matter of law. Accordingly, the motions of the defendants, NOPSI, Co-operative and Amalgamated for summary judgment in their favor dismissing plaintiff's action against them with costs, should be, and they are hereby, *GRANTED.* In all other respects the motions are *DENIED.*

/s/ Judge Boyle
UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana
March 10, 1977

Glenn N. HEFNER, etc.,
Plaintiff-Appellant,

v.

NEW ORLEANS PUBLIC SERVICE, INC., et al.,
Defendants-Appellees.

No. 77-1671.

United States Court of Appeals, Fifth Circuit.

Nov. 1, 1979.

Appeal from the United States District Court
for the Eastern District of Louisiana.

Before GOLDBERG, FAY and VANCE, Circuit Judges.

GOLDBERG, Circuit Judge:

This case involves a challenge under Title VII of the Civil Rights Act of 1964, U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981 to a consent decree resulting from an earlier class action suit and a collective bargaining agreement incorporating its provisions. Together, these agreements implemented an affirmative action program for black transit operators. We do not reach the merits of either of plaintiff's claims since both were filed much too late to be considered, and affirm the trial court's dismissal of the complaint.

I

Factual Background

Plaintiff Glenn N. Hefner, a white bus driver for New Orleans Public Service, Inc. ("NOPSI"), brought this action

on June 25, 1976, against NOPSI, the Co-operative Street Railway Employees Association, and the Amalgamated Transit Union ("ATU") [1] claiming unlawful "reverse" racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and of 42 U.S.C. § 1981. Hefner purports to represent a class of similarly-situated employees of NOPSI, although the case has never been certified as a class action.

Hefner's complaint challenges certain provisions of a bargaining agreement between NOPSI and ATU signed in December, 1974. The bargaining agreement incorporated the consent order entered in *Faggen v. New Orleans Public Service, Inc.*, No. 70-2946 (E.D.La. March 8, 1974). The propriety of the consent order is also challenged on constitutional and statutory ground. The challenged provisions provide that "pick" lists used for choice of bus routes and vacation time are to be established by alternating white and black drivers, respectively. Thus, whites occupy the oddnumbered positions on the "pick" lists, and black occupy the even-numbered positions.

On March 7, 1974, the day before the consent decree was entered, Hefner filed a charge with the Equal Employment Opportunity Commission alleging discrimination. The EEOC did not investigate the charge because it believed that the district court's entry of the consent order divested it of jurisdiction over the charge. On May 22, 1974, the EEOC informed Hefner of this conclusion and recommended that he request a hearing on the consent order in the District Court or appeal it to the United States Court of Appeals of the Fifth Circuit.

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1. Amalgamated Transit Union is the sucessor as bargaining representative for NOPSI's transit employees of the Co-operative Street Railway Employees Association.

On March 30, 1976, the EEOC sent Hefner a letter notifying him that he had the right to sue in federal court within ninety days. Hefner then filed his complaint in this action on June 25, 1976.

The Defendants moved that the complaint be dismissed for failure to state a claim upon which relief can be granted or, in the alternative, for summary judgment. The district court granted defendants' motion and dismissed the complaint. It held that the remedial provisions of the consent order were lawful under Title VII and that § 1981 conferred no right of action upon white persons.

II

Timeliness of Title VII Claim

[1] The statutory provision at issue here is 42 U.S.C.A. § 2000e-5(f)(1) (West 1974), which states in relevant part:

> . . . [i]f a charge filed with the Commission . . . is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . , shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved.

In administering this section, forsome time the EEOC used a two-step procedure by which it would first send a letter

informing the complainant either that his charge had been dismissed, his file administratively closed, or that conciliation efforts had failed, and that a second letter (often referred to as a "right-to-sue" letter) would be issued upon the request of the complainant or his attorney. [2] Some of these letters explicitly informed the recipient that he would have ninety days from his receipt of the right to sue letter to file suit in federal court. [3] In *Zambuto v. American Telephone & Telegraph Co.*, 544 F.2d 1333 (5th Cir. 1977), we held this "twotier" procedure to be invalid, but applied our ruling prospectively only so that parties misled by the EEOC's procedure would not lose their right to have their claim heard in federal court. [4]

In this case, we are faced with a somewhat mysterious variant on the "twotier" procedure. The first letter sent by the EEOC to Hefner [5] did not inform him that he could request

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2. *See, e. g., Bernard v. Gulf Oil Co.*, 596 F.2d 1249 (5th Cir. 1979); *Lynn v. Western Gillette Co.*, 564 F.2d 1282 (9th Cir. 1977); *Turner v. Texas Instruments, Inc.*, 556 F.2d 1349 (5th Cir. 1977); *Zambuto v. American Telephone & Telegraph Co.*, 544 F.2d 1333 (5th Cir. 1977); *Pacheco v. Phelps Dodge Refining Corp.*, 531 F.2d 709 (5th Cir. 1976); *DeMatteis v. Eastman Kodak Co.*, 520 F.2d 409 (2d Cir. 1975) (on rehearing).

3. *See, e. g., Turner, supra; Lacy v. Chrysler Corp.*, 533 F.2d 353 (8th Cir.), *cert. denied*, 429 U.S. 959, 97 S.Ct. 381, 50 L.Ed.2d 325 (1976).

4. *Accord DeMatteis v. Eastman Kodak Co.*, 520 F.2d 409 (2d Cir. 1975) (on rehearing). The EEOC apparently had terminated use of the two-tier procedure some time prior to our decision in *Zambuto*. *See Zambuto, supra*, 544 F.2d at 1335 n.6.

5. This letter is dated May 22, 1974.

a right to sue letter; nor did it inform him that any further EEOC action on his claim was contemplated. It stated explicitly that Hefner's file had been administratively closed because, it said, the EEOC was "powerless to investigate a company which acts in accordance with a Court Order." It also stated that the EEOC had concluded that it lacked jurisdiction to investigate the matter, and that Hefner's appropriate remedy was to request a hearing on the Order in District Court or to appeal the Order to the United States Court of Appeals for the Fifth Circuit.

Whether or not the letter was correct in stating that the EEOC was powerless to investigate the charge, an issue we need not decide, it clearly informed Hefner that he could expect no further action from the EEOC, *i. e.*, that, as far as the EEOC was concerned, his charge was dismissed. This situation is thus entirely different from those in which the first letter communicates that efforts at conciliation have failed and indicates that further action by the EEOC in contemplated, *see, e. g., Turner v. Texas Instruments, Inc.*, 556 F.2d 1349 (5th Cir. 1977), or in which the first letter states only that efforts at conciliation have failed and that complainant has the right to file suit in federal court, *see Page v. United States Industries, Inc.*, 556 F.2d 346 (5th Cir. 1977), *cert. denied*, 434 U.S. 1045, 98 S.Ct. 890, 54 L.Ed.2d 796 (1978). In the latter situation, this Court found that the first letter did not unambiguously inform the complainant that the EEOC had decided not to sue. *See id.*, 556 F.2d at 351; *Zambuto, supra*, 544 F.2d at 1335. Here, as in *Key v. Lumberjack Meats, Inc.*, 434 F.Supp. 289 (N.D.Ala.1977), the plaintiff could not

have reasonably been misled by the first letter into believing that the EEOC contemplated further action: "there could be no doubt in the plaintiff's mind that he would receive no further help from the EEOC." *Id.* at 292.

We have previously held that the notice sent by the EEOC need not inform the Complainant of his right to sue, and that it "need only inform the complainant that the administrative process is terminated." *Page v. United States Industries, Inc.*, 556 F.2d 346, 351 n.2 (5th Cir. 1977); *see Zambuto, supra*, 544 F.2d at 1335; *Key v. Lumberjack Meats, Inc.*, 434 F.Supp. 289 (N.D.Ala.1977); *ct. Eastland v. Tennessee Valley Authority*, 553 F.2d 364, 369 (5th Cir.) *cert. denied*, 434 U.S. 985, 98 S.Ct. 611, 54 L.Ed.2d 479 (1977) (notice requirement of 42 U.S.C. s 2000e-16). [6] The letter of May 22, 1974, sent to Hefner by the EEOC clearly met this test.

6, The Ninth Circuit has taken the contrary view, *see Lynn v. Western Gillette, Inc.*, 564 F.2d 1282, 1286 (9th Cir. 1977), but it relied on the EEOC's regulations which then required the EEOC to send a specific form of notice, including notice of the right to sue, when conciliation efforts had failed. *See* 29 C.F.R. s 1601.25 (1972). This case can be distinguished, because the regulations have never made any provision for dismissals for lack of jurisdiction and therefore do not mandate additional notice in this situation. We also note that the Eighth Circuit has held that the running of the ninety-day period is triggered by a notice explicitly advising plaintiff that the EEOC has decided not to file suit, even though the notice also incorrectly informs the complainant that he must request a right to sue letter before he can file suit, and will then have ninety days in which to sue. *See Lacy v. Chrysler Corp.*, 533 F.2d 353, 360 (8th Cir.) *cert. denied*, 429 U.S. 959, 97 S.Ct. 381, 50 L.Ed.2d 325 (1976). Whatever the relative merits of the various rules, we are bound by the decisions of this Circuit.

Approximately twenty-two months after it sent the first letter, for no apparent reason, [7] the EEOC sent Hefner a form letter entitled "Notice of Right to Sue," which informed him that if he wished to file suit in federal court, he would have to do so within ninety days of receipt of the letter. [8]

If this second letter had been received within ninety days of the first letter, Hefner might persuasively claim that he had failed to file suit within ninety days of the first letter because he was misled by the EEOC into believing that he had ninety days from receipt of the second letter in which to file suit. When incorrect statements of the law in letters

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7. The letter, in a box provided for indicating the reasons for dismissal of the charge, states "you requested issuance of this Notice of Right to Sue." There is no evidence in the record indicating when Hefner made such a request, or even that he ever made it.

8. The full text of this letter, dated March 30, 1976, is as follows:

> If you want to pursue your charge further, you have the right to sue the respondent(s) named in this case in the United States District Court for the area where you live. If you decide to sue, you must do so within ninety (90) days from the receipt of this Notice; otherwise your right is lost.
>
> If you do not have a lawyer or are unable to obtain the services of a lawyer, take this Notice to the United States District Court which may in its discretion, appoint a lawyer to represent you.
>
> An information copy of this Notice has been sent to the respondent(s) named in this case. If you have any questions about your legal rights or need help in filing your case in court, call the EEOC representative named above.

from the EEOC have caused potential plaintiffs to file suit within the statutory period, both we and other courts of appeals have been sympathetic to the argument that reliance on misinformation from the agency charged with protecting employee rights should not preclude the employee from enforcing those rights. *See, e. g. Zambuto, supra; DeMatteis, supra,* [9] But *see Lacy v. Chrysler Corp.*, 533 F.2d 353, 360

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9. This is true despite the fact that the ninety-day period for filing in federal court has been called "jurisdictional" in cases such as *Lacy v. Chrysler Corp.*, 533 F.2d 353, 361 (8th Cir. 1976) (Dissenting opinion); *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306, 309 (2d Cir. 1975), *modified*, 520 F.2d 409; *Genovese v. Shell Oil Co.*, 488 F.2d 85 (5th Cir. 1973). *See Pacheco v. Phelps Dodge Refining Corp.*, 531 F.2d 709, 711 (5th Cir. 1976); *cf. Brown v. General Services Administration*, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976) (time limit in 42 U.S.C. § 2000e-16).

In *Chappell v. Emco Machine Works Co.*, 601 F.2d 1295 (5th Cir. 1979), we dealt with the question of whether the 180 - day period should be treated as a jurisdictional requirement or a statute of limitations and noted that in certain circumstances equitable modification of the limitation is appropriate, regardless of how it is characterized. At least three categories of cases call for such equitable modification. *See id.* Assuming *arguendo* that the ninity-day period at issue here should be treated similarly, this case falls into none of those categories. Two of the three categories relate to delay in filing the initial EEOC complaint and are not relevant here. The third category, reliance on misinformation received from the EEOC, is also not applicable on the record before us, since the ninety-day filing period had expired long before Hefner received the letter containing the misinformation. Moreover, the facts here alleged do not call for exercise of our equitable discretion to allow Hefner to pursue his Title VII claim, since Hefner simply waited twenty-two months to pursue his claim in court, far in excess of the ninety days allowed by statute.

(8th Cir.), *cert. denied*, 429 U.S. 959, 97 S.Ct. 381, 50 L.Ed.2d 325 (1976). Here, however, the second letter was not received by Hefner until long after the ninety-day filing period had expired. He thus cannot claim that he was misled by either the first or the second letter into missing the filing deadline. [10]

III

Timeliness of § 1981 Claim

[2] The trial court rejected Hefner's claim under 42 U.S.C. § 1981, relying on our decision in *McDonald v. Santa Fe Trail Transporation Co.*, 513 F.2d 90 (5th Cir. 1975), *reversed*, 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976), which held that § 1981 confers no actionable rights upon white persons. The Supreme Court has since reversed our holding in that case, *McDonald v. Sante Fe Trail Transporation Co.*, 96 S.Ct. 2574 (1976). We are therefore compelled to

10. At oral artument before us, Hefner's attorney raised for the first time the possibility that Hefner may have been misled into thinking he would receive the first letter. There is no reference to such a conversation anywhere in the record, so of course we cannot now consider what might be the effect of the receipt of misinformation from the EEOC in a telephone conversation. *See Congress & Empire Spring Co. v. Knowlton*, 103 U.S. 49, 61, 26 L.Ed. 347 (1881); *cf. Schely v. Pullman's Palace Car Co.*, 120 U.S. 575, 7 S.Ct. 730, 731, 30 L.Ed. 789 (1887) (statements in printed brief); *Bono v. United States*, 113 F.2d 724, 725 (2d Cir. 1940) (same). *But cf. DeMatteis, supra*, 520 F.2d at 410 (on rehearing) (case remanded to district court for factual determination of contents of cover letter sent by EEOC).

hold that the district court's dismissal on this ground was in error. [11]

However, we affirm the trial court's dismissal of Hefner's § 1981 claim because it, like the Title VII claim, was time-barred at the time he filed his complaint. Hefner was aware of the terms of the consent decree not later than March 7, 1974, he filed a complaint with the EEOC, challenging the terms of the consent decree. By letter dated May 22, 1974, he was informed that the EEOC would not assist him in obtaining modification of the decree. Yet Hefner did not file his complaint until June 25, 1976.

Two years is simply too long a delay in these circumstances, absent a compelling justification. [12] Although the

11. The trial court's error was our own on this issue of law. In fact, his error was compelled by his duty to follow our since-overruled theory of § 1981. Neither we nor he can be considered blameworthy for lacking sufficient clairvoyance to predict that *Santa Fe* would blaze a new trail.

12. We of course express no opinion as to how short a delay might be acceptable. This is ordinarily a matter within the trial court's discretion, *cf. United States by Bell v. Allegheney-Ludlum Industries, Inc.*, 553 F.2d 451 (5th Cir. 1977) (per curiam), *cert. denied sub nom. United Steelworkers Justice Committee v. United States*, 435 U.S. 914, 98 S.Ct. 1467, 55 L.Ed.2d 505 (1978) (post-judgment motion to intervene), and will depend on plaintiff's justification for the delay and the degree of prejudice to other parties. *See generally, Stallworth v. Monsanto Co.*, 558 F.2d 257 (5th Cir. 1977).

The same considerations which govern our disposition of the timeliness issue, as discussed below, apply whether this be treated as a motion to intervene after the judgment, see

(footnote 12 continued on following page)

complaint is framed as an independent cause of action, much of the relief sought is an injunction prohibiting NOPSI and ATU from implementing or enforcing the provisions of the consent decree and the collective bargaining agreement which incorporates it. [13]

Assuming *arguendo* that an independent action to attack a consent decree is appropriate, [14] to allow plaintiff to attack

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(footnote 12 continued)
Stallworth v. Monsanto Co., 558 F.2d 257 (5th Cir. 1977), *United States by Bell v. Allegheney-Ludlum Industries, Inc.*, 553 F.2d 451 (5th Cir. 1977) (per curiam), *cert. denied sub nom. United Steelworkers Justice Committee v. United States*, 435 U.S. 914, 98 S.Ct. 1467, 55 L.Ed.2d 505 (1978), an independent action to set aside the judgment, or an independent action seeking relief clearly inconsistent with the prior judgment. *Cf. Bankers Mortgage Company v. United States*, 423 F.2d 73, 77 n.7 (5th Cir.), *cert. denied*, 399 U.S. 927, 90 S.Ct. 2242 (1970) (independent action for relief from judgment may be treated as Fed.R.Civ.P. 60(b) motion for relief from judgment).

13. The relief requested includes, *inter alia:*

"That this Court rescind those provisions of the Consent Order in C.A. No. 70-2846 (sic) with respect to the 'pick' lists and 'seniority rights', . . .

"that the vested 'seniority rights' of the Plaintiff and the class he represented be reinstated." . . .

"That this Court issue preliminary and permanent injunctions restraining and enjoining Defendants from implementing and enforcing the provisions of the labor contract between the Defendants which incorporates the terms of the Consent Order in C.A. 70-2946. . ."

14. Several courts have held themselves to be without jurisdiction to entertain such a suit because the plaintiff should have intervened in the prior action. *See Black and White Children of the Pontiac School System v. School District of Pontiac*, 464 F.2d 1030 (6th Cir. 1972); *Prate v. Freedman*, 430
(footnote 14 continued on following page)

the decree at this late point would severely undercut inportant motions of judicial efficiency and finality of judgment, and would unfairly prejudice other parties and non-parties. He is therefore barred by laches from bringing this suit. When an inexcusable delay prejudices others, laches bars the claim. *See In re Casco Chemical Co.*, 335 F.2d 645, 651 (5th Cir. 1964); *Davis v. Alabama Power Co.*, 383 F.Supp. 880 (N.D. Ala.1974). The *Faggen* consent decree was reached after careful consideration by the parties involved; they do not wish, and should not be forced, to defend the decree in lawsuits brought long after the decree was signed. Allowing suits like this would severly undercut the strong policy in favor of reaching voluntary settlements to resolve Title VII actions, *see Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974); *United States v. Alleghney-Ludlum Industries, Inc.*, 517 F.2d 826, 846 (5th Cir. 1975), *cert. denied sub nom. Harris v. Allegheny-Ludlum Industries, Inc.*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976). NOPSI and ATU would be forced to incur additional expense solely because of plaintiff's delay. Employees of NOPSI had built

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(footnote 14 continued)
F.Supp. 1373 (W.D.N.Y.), *aff'd*, 573 F.2d 1294 (2d Cir. 1977), *cert. denied*, 436 U.S. 922, 98 S.Ct. 2274, 56 L.Ed.2d 765 (1978); *McAleer v. American Telephone & Telegraph Co.*, 416 F.Supp. 435 (D.D.C.1976); *OBurn v. Shapp*, 70 F.R.D. 549 (E.D.Pa.1976), *aff'd* 546 F.2d 418 (3d Cir. 1976), *cert. denied*, 430 U.S. 968, 97 S.Ct. 1650, 52 L.Ed.2d 359 (1977); *Construction Industry Combined Committee v. International Union of Operating Engineers*, 67 F.R.D. 664 (E.D.Mo. 1975). Because of our holding that plaintiff is barred by laches from bringing this claim, we need not decide whether wewould follow these cases.

up expectations based on over two years of experience with the terms of the consent decree. The *Faggen* plaintiffs may no longer be represented by counsel; in any event, they would likely be put to substantial additional expense to protect the relief won in *Faggen*.

Hefner does not claim that he was unaware of the terms of the consent decree during the two-year period. He actually filed his complaint with the EEOC challenging the terms of the decree the day before it was entered. [15] Nor does he offer any explanation for his delay in filing this suit. He does not claim that the *Faggen* suit was collusive, or that fraud, accident, or mistake infected the original suit or prevented him from discovering his rights.

Therefore, we hold that Hefner's efforts to upset the consent decree were untimely, and affirm on this basis the district court's dismissal of the § 1981 claim.

AFFIRMED.

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15. We leave open whether the filing of an EEOC complaint justifies a plaintiff in delaying his challenge to the decree until the EEOC has acted on his complaint. Here, Hefner's delay until the EEOC had responded to his complaint accounts for only about two and one-half months of the two-year delay. We also note that the letter sent to Hefner by the EEOC on May 22, 1974 informed Hefner that the appropriate remedy was to request a hearing on the consent order in district court or appeal the order to this court. Thus Hefner cannot claim that he had no knowledge of these possibilities.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED MAR 22, 1977, 9:27 AM

GLENN N. HEFNER, Individually and on behalf of all other persons similarly situated;

PLAINTIFF

VERSUS

THE ORLEANS PUBLIC SERVICE, INC.; THE CO-OPERATIVE STREET RAILWAY EMPLOYEES' ASSOCIATION OF NEW ORLEANS; and the AMALGAMATED TRANSIT UNION, DIVISION 1560

CIVIL ACTION
NO: 76-1918
SECTION "D"

NOTICE OF APPEAL

Notice is hereby given that Glenn N. Hefner, Plaintiff in the above numbered and entitled cause, individually and on behalf of all other persons similarly situated, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment granting Defendants' Motion for Summary Judgment, entered on the 14th day of March, 1977.

RESPECTFULLY SUBMITTED:

/s/ Dale C. Wilks
DALE C. WILKS, ESQUIRE

/s/ Louis B. Merhige

LOUIS B. MERHIGE, ESQUIRE
ATTORNEYS FOR PLAINTIFF
Suite 1370, Saratoga Building
New Orleans, Louisiana 70112
581-4594

CERTIFICATE

I certify that a copy of the above and foregoing pleading has been served on all counsel of record be depositing same in the United States mail, postage prepaid, addressed to them at their respective offices, this 18th day of March, 1977.

/s/ Dale C. Wilks

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
STATE OF LOUISIANA

NO. 77-1671

GLENN N. HEFNER, etc.

Plaintiff-Appellant

versus

NEW ORLEANS PUBLIC SERVICE, INC. et al.

Defendant-Appellee

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Glenn N. Hefner, the Plaintiff above named, hereby appeals to the Supreme Court of the United States from the final judgment of this Court dismissing his complaint, entered in this action on November 1, 1979.

This appeal is taken pursuant to Title 28 USC §1254.

Respectfully submitted:

/s/ Dale C. Wilks

DALE C. WILKS
Attorney at Law
234 Loyola Avenue, Suite 815
New Orleans, Louisiana 70112
(504) 529-4107

LOUIS B. MERHIGE
Attorney at Law
317 Magazine Street
New Orleans, Louisiana 70130

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served upon all counsel of record for all parties by mailing same to each, properly addressed and postage prepaid this 14th day of November, 1979.

/s/ Dale C. Wilks
DALE C. WILKS

III. "PICK" LISTS.

A. In lieu of the present practice of compiling "pick" lists in order of each Operator's length of service as an Operator, the following procedures shall apply:

1. A list of the white Operators hired on November 29, 1971 or earlier, in descending order of their total length of service as Operators, and a list of black Operators hired on November 29, 1971 or earlier, in descending order of their total length of service as Operators, shall be merged so that the most senior white Operator is first, the most senior black Operator is second, the second most senior white Operator is third, the second senior black Operator is fourth, and so on, alternating white and black, until the two lists are exhausted. If one list is exhausted before the other, the balance of the names shall be placed at the end of the merged list in descending order of length of service as Operators.

2. When any Operator who is placed in the merged portion of the list, in accordance with the procedure specified in subpart A(1), leaves the Operator classification for any reason, the more junior operators on the merged portion of the list of the same race as the Operator who has left the classification shall each be moved up two places, so that the persons in all the odd numbered positions continue to be white and persons in all even numbered positions continue to be black, until the point that all the Operators of a particular race employed as Operators on or before November 29, 1971 are exhausted. If, at any time, the number of Operators of one

race employed as Operators on or before November 29, 1971 exceeds the number of Operators of the other race so employed, the balance of the larger group shall be listed at the end of the merged list in descending order of length of service as Operator.

3. After all of the Operators hired on or before November 29, 1971 are listed, all other incumbent Operators shall be listed, without regard to race, in descending order of length of service as Operators, subject to the provisions of Section I(6)(b) of this Order.

4. The list drawn in accordance with the dictates of subpart A(1), (2) and (3) of this Section shall constitute a Master "Pick" List. Any Operator newly hired by NOPSI after the date of this decree shall be placed on the Master "Pick" List, in order of their employment as Operators, below the names of all incumbent Operators.

B. Operators shall be ranked on station-wide "pick" lists in accordance with their relative position on the Master "Pick" List. Station-wide "pick" lists, so constituted, shall be used for all purposes for which "pick" lists have been used in the past, specifically for choice of runs and choice of vacation time. In the case of choice of runs, these lists shall first be used for the June, 1974 pick. In the case of choice of vacation time, these lists shall first be used for the November, 1974 pick.

(PLEASE PRINT OR TYPE)

CHARGE OF DISCRIMINATION — EEOC Charge No. TNO4 1440 — FORM APPROVED OMB No. 124-R0001

INSTRUCTIONS
If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's District Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE. (Attach extra sheets of paper if necessary.)

CAUSE OF DISCRIMINATION
- [X] RACE OR COLOR
- [ ] SEX
- [ ] RELIGIOUS CREED
- [ ] NATIONAL ORIGIN

NAME (Indicate Mr. or Mrs.): GLENN HEFNER
DATE OF BIRTH: 7/21/39
STREET ADDRESS: 3409 Wanda Lynn Dr.
COUNTY:
SOCIAL SECURITY NO.: 437-52-4769
CITY, STATE, AND ZIP CODE: Metairie, LA
TELEPHONE NO. (Include area code): 887-4855

THE FOLLOWING PERSON ALWAYS KNOWS WHERE TO CONTACT ME

NAME (Indicate Mr. or Mrs.): Barbara Hefner
TELEPHONE NO. (Include area code): same
STREET ADDRESS: same
CITY, STATE, AND ZIP CODE:

LIST THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT WHO DISCRIMINATED AGAINST YOU (If more than one, list all)

NAME: New Orleans Public Service, Inc.
TELEPHONE NO. (Include area code):
STREET ADDRESS: 317 Baronne St.
CITY, STATE, AND ZIP CODE: New Orleans, LA

OTHERS WHO DISCRIMINATED AGAINST YOU (If any): Cooperative Street Railway Employee's Assn.
302 Magazine St., New Orleans, LA

CHARGE FILED WITH STATE/LOCAL GOV'T. AGENCY: [ ] YES [X] NO
DATE FILED:
AGENCY CHARGE FILED WITH (Name and address):

APPROXIMATE NO. OF EMPLOYEES/MEMBERS OF COMPANY OR UNION THIS CHARGE IS FILED AGAINST: over 15
DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE (Month, day, and year): 3/7/74

Explain what unfair thing was done to you and how other persons were treated differently. Understanding that this statement is for the use of the United States Equal Employment Opportunity Commission, I hereby certify:

Respondent Company and Respondent Company's Employee's Association is discriminatorily rearranging the seniority list on the basis of race, specifically in regard to the "pick list" and vacation list.

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

DATE: 3.7.74
CHARGING PARTY (Signature): Glenn M Hefner

Subscribed and sworn to before the EEOC representative.

DATE: 3/7/74
SIGNATURE AND TITLE: Cynthia F. M. Gresham, Equal Employment Tech

NOTARY PUBLIC

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (Day, month, and year)

EEOC FORM NO. 5 — Previous editions of this form may be used. — U.S. GOVERNMENT PRINTING OFFICE : 1973—720-451/1250 3—

EEOC AFFIDAVIT

Check One: ☐ RESPONDENT ☒ CHARGING PARTY ☐ WITNESS

After being duly sworn and upon my oath, I depose and say:

NAME: OLENN HEFNER	AGE: 7/21/39	TEL. NO. (Give area code): 887-4855
ADDRESS (Number and street): 3409 Wanda Lynn Dr	CITY: Metairie, LA	
COUNTY/PARISH: Jefferson	STATE/COMMONWEALTH:	

THE FOLLOWING PERSON CAN ALWAYS CONTACT ME

NAME: Barbara Hefner	RELATIONSHIP:	TEL. NO. (Give area code):
ADDRESS (Number and street):	CITY AND STATE/COMMONWEALTH:	

STATUS OF EMPLOYMENT

Check One: ☐ NOT WORKING ☐ WORKING ☐ SOUGHT EMPLOYMENT AT

NAME OF EMPLOYER: New Orleans Public Service Inc

TYPE OF BUSINESS:

DATE OF EMPLOYMENT/WHEN EMPLOYMENT WAS SOUGHT: FROM: TO:

POSITION TITLE: Bus Operator	DEPARTMENT: Transportation
LOCATION (Number and street): 317 Baronne St.	CITY: New Orleans, LA
COUNTY/PARISH:	STATE/COMMONWEALTH: WORK TEL. NO. (Give area code):

Additionally, On March 7, 1974 I was told that my employee's association and my employer entered into an agreement to rearrange the seniority list on the basis of race, specifically in regard to vacation a "pick list". Three pages of this agreement are attached and made part of this affidavit. These three pages clearly outline the fact that the seniority list is to be based primarily on race and secondly on date of employment.

EEOC FORM JAN 7, 133

I swear or affirm that I have read the above statement and that it is true to the best of my knowledge, information and belief.

SIGNATURE	SOCIAL SECURITY NO.	TOTAL NO. OF PAGES
Olenn R Hefner	437-52-4769	1

SUBSCRIBED AND SWORN TO BEFORE THIS EEOC REPRESENTATIVE

DATE	TITLE	SIGNATURE
3/7/74	Equal Employment Technician	Cynthia L. Fitzgerald

EEOC FORM JAN 7, 133

Minute Entry
May 11, 1974
BOYLE, J.

U.S. District Court
Eastern District of Louisiana
Filed May 13, 1974

HENRY FAGGEN, individually and on behalf
of all others similarly situated

VERSUS

NEW ORLEANS PUBLIC SERVICE, INC., ET AL

NO. 70-2946
CIVIL ACTION
SECTION D

Certain "white members of the Cooperative Street Railway Employees Association" have moved this Court "for relief from and to set aside or vacate the consent order" which was dispositive of all issues in this litigation. These "white members" were represented in this litigation by their collective bargaining agent, Cooperative Street Railway Employees Association, which has consented to the order from which the movers seek relief.

All parties to this litigation, including the movers' bargaining agent, oppose the motion by the "white members of the Association" on the ground the "white members" are not parties to this suit. Rule 60(b) of the Federal Rules of Civil Procedure requires that a *party* move the Court for relief from a final judgment or order. Since the "white members of

the Cooperative Street Railway Employees Association" are not a party to this litigation, they have no standing under Rule 60(b) to move this Court for relief from the consent order entered herein. Movers have referred us to no authority supporting their position.

The motion should be, and the same is hereby, DENIED.

Richard B. Sobol, Esq.
Michael J. Molony, Jr., Esq.
Richard A. Dowling, Esq.
Lenon J. Parent, Jr., Esq.

NEW ORLEANS DISTRICT OFFICE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
333 ST. CHARLES STREET
NEW ORLEANS, LOUISIANA 70130

May 22, 1974

Re: Charge No. TN04 1444

Glen Hefner
3409 Wanda Lynn Dr.
Metairie, LA

Re: Charge No. TN04 1440

Dear Mr. Hefner:

Further reference is made to the charge of discrimination which you filed on March 7, 1974, against New Orleans Public Service, Inc.

This office has reviewed your charge of discrimination and, on the basis of the information contained therein, we have concluded that the Commission has no jurisdiction to investigate the matter involved. Accordingly, your file on this matter has been administratively closed for the following reasons:

1. The action which you complained of was taken by the company pursuant to the Order of a U. S. District Court. This Commission is powerless to investigate a company which acts in accordance with a Court Order; and

2. The appropriate remedy for you, either through your Association or individually, is to request a hearing on the Order in the U. S. District Court which issued it or to appeal the Order to the U. S. Court of Appeals for the Fifth District.

Please feel free to contact this office if you have any questions on this matter.

Sincerely,

GLENN P. CLASEN
District Director

CHARGING PARTY FOLLOW-UP (RETURN)

RE: (DING CHARGE) TN04-1440 FILED 3-7-74

☐ KEEP MY CHARGE OPEN AND WORK ON IT WHEN YOU CAN.

☐ I WISH TO SUE THE RESPONDENT MYSELF. I ☐ DO ☐ DO NOT NEED YOUR ASSISTANCE IN OBTAINING AN ATTORNEY.

☐ I DO NOT WISH TO PURSUE MY CHARGE. PLEASE CLOSE MY FILE.

REMARKS:

(Date) (Signature)

(Telephone No.) (Present Address)

Equal Employment Opportunity Commission
333 St. Charles Ave. - Rm. 1711
New Orleans, Louisiana 70130

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE, $300

POSTAGE AND FEES PAID
U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

4/1/76

Glenn Hefner
3409 Wanda Lynn Dr.
Metairie, La.

CHARGING PARTY FOLLOW-UP (RETURN)

REGARDING CHARGE # TH04-1440 FILED 3-?-74

☐ KEEP MY CHARGE OPEN AND WORK ON IT WHEN YOU CAN.

☐ I WISH TO SUE THE RESPONDENT MYSELF. I ☑ DO ☐ DO NOT NEED YOUR ASSISTANCE IN OBTAINING AN ATTORNEY.

☐ I DO NOT WISH TO PURSUE MY CHARGE. PLEASE CLOSE MY FILE.

REMARKS:

3-12-76
(Date)

[illegible]
(Signature)

[illegible]
(Telephone No.)

[illegible]
(Present Address)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

TO:	FROM:
Mr. Glenn E. Hefner 3409 Wanda Lynn Drive Metairie, Louisiana 70002	New Orleans District Office Equal Employment Opportunity Commission Hale Boggs Federal Building 500 Camp Street, Suite 1007 New Orleans, Louisiana 70130
THIS CHARGE HAS BEEN DISMISSED FOR THE FOLLOWING REASON: You requested issuance of this Notice of Right to Sue. ☐ NO REASONABLE CAUSE ☐ UNTIMELY CHARGE ☐ NO JURISDICTION ☐ FAILURE TO PROCEED	EEOC REPRESENTATIVE Elizabeth Doucet, District Counsel TELEPHONE NUMBER: (504) 505-2735 CASE/CHARGE NUMBER: TH04 1440

If you want to pursue your charge further, you have the right to sue the respondent(s) named in this case in the United States District Court for the area where you live. If you decide to sue, you must do so within ninety (90) days from the receipt of this Notice; otherwise your right is lost.

If you do not have a lawyer or are unable to obtain the services of a lawyer, take this Notice to the United States District Court which may, in its discretion, appoint a lawyer to represent you.

An information copy of this Notice has been sent to the respondent(s) named in this case.

If you have any questions about your legal rights or need help in filing your case in court, call the EEOC representative named above.

3-30-76.
Date

[signature]
District Director

cc: Chief Executive Official
New Orleans Public Service, Inc.
317 Baronne Street
New Orleans, Louisiana

Certified Mail # 559651
Return Receipt Requested

CERTIFIED MAIL

EEOC Form 161 (Rev. APR 73) CHARGING PARTY'S COPY

79-1152

Supreme Court, U. S.
FILED
MAR 18 1980
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1671

GLENN N. HEFNER, Individually And On Behalf Of
All Other Persons Similarly Situated,
Plaintiff-Appellant,

versus

NEW ORLEANS PUBLIC SERVICE, INC.,
THE CO-OPERATIVE STREET RAILWAY
EMPLOYEES' ASSN. OF NEW ORLEANS, and
THE AMALGAMATED TRANSIT UNION, DIVISION 1560,
Defendant-Appellees.

On Appeal from the United States Court of Appeals
for the Fifth Circuit

MOTION OF APPELLEE NEW ORLEANS PUBLIC SERVICE, INC. TO DISMISS

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New Orleans Public Service, Inc. (NOPSI), appellee herein, respectfully moves this Court pursuant to Rule 16, Rules of the Supreme Court of the United States, to dismiss the appeal from the decision of the United States Court of Appeals for the Fifth Circuit in *Hefner v. New Orleans Public Service, Inc.*, 605 F.2d 893 (5th Cir. 1979) on the ground that such appeal is not within this Court's jurisdiction.

STATEMENT OF THE CASE

The Court of Appeals in *Hefner v. New Orleans Public Service, Inc., supra,* affirmed the trial court's dismissal of appellant's complaint which challenged the consent order entered in an earlier class action lawsuit (*Faggen v. New Orleans Public Service, Inc.*, Civil Action No. 70-2946, United States District Court for the Eastern District of Louisiana). The Court correctly found that appellant's claim under Title 42, United States Code, section 2000-3, *et seq.* was time barred by the ninety day statutory limitations period and that his claim under Title 42, United States Code, section 1981 was barred by the equitable doctrine of laches. It is from this judgment that the appellant has filed a Jurisdictional Statement seeking to invoke the appellate jurisdiction of this honorable Court.

I. REASONS FOR DISMISSAL

In his Jurisdictional Statement the appellant relies on the statutory provisions of Title 28, United States

Code, section 1254 as his basis for appellate jurisdiction in this Court. However, section 1254 allows review of federal court adjudications by way of appeal only in those cases where the Court of Appeals has held a state statute to be invalid under the Constitution, treaties or law of the United States. 14 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* §4037 (1978).

In the case appealed herein no such action was taken by the Court of Appeals. The court based its decision solely on federal statutory interpretation and equitable principles and not on constitutional grounds.

There is no statutory authority conferring jurisdiction on this Court by way of appeal in cases of this nature. The decision below is reviewable, if at all, only by a properly presented petition for a writ of certiorari, 28 U.S.C. §1254(1). Accordingly, this improvidently taken appeal should be dismissed for lack of jurisdiction.

II. ALTERNATIVELY, THE JURISDICTIONAL STATEMENT FILED BY APPELLANT FAILS TO STATE SUFFICIENT GROUNDS FOR THE GRANTING OF A WRIT OF CERTIORARI

Alternatively, in the event that the Court treats the documents filed by the appellant as a petition for writ of certiorari, the appellee submits that the petition should be denied for the reasons hereinafter set forth. *See* 28 U.S.C. §2103.

In affirming the dismissal of the appellant's employment discrimination claims, the Court of Appeals specifically noted the unique facts upon which this suit is based.

The appellant, a caucasian transit operator employed by NOPSI, filed this action on June 25, 1976 against NOPSI, the Co-Operative Street Railway Employees Association (Co-Operative), and Co-Operative's successor as the collective bargaining representative of NOPSI's transit employees, the Amalgamated Transit Union (ATU), alleging unlawful discrimination on the basis of sex. He specifically challenged the provisions contained in section IiI of the consent order entered in *Faggen v. New Orleans Public Service, Inc., supra*, governing the revised pick list of white and black transit operators, as well as the collective bargaining agreement between NOPSI and the ATU incorporating such revised pick list.

Some two years prior to his lawsuit, on March 7, 1974, the appellant filed a formal charge of discrimination with the Equal Employment Opportunity Commission challenging the *Faggen* consent order. Thereafter, on May 22, 1974, the EEOC advised appellant by letter that his file had been administratively closed after the agency determined that it was powerless to investigate employment practices by a company acting in compliance with a court order. The EEOC letter recommended that the appellant oppose the *Faggen* consent order either through intervention in that action before the district court and/or appeal to the court of appeals. No further action was taken by either the appellant or the EEOC until approximately twenty-two months later when the EEOC sent the appellant a form letter at his request entitled "Notice of Right To Sue". This letter informed him that if he wished to file suit in federal court, he would have to do so within ninety days of receipt of the letter. Three months later the appellant filed this lawsuit.

In its written opinion the Court of Appeals below discussed the standard "two letter" procedure formerly utilized by the EEOC wherein that agency would first notify a complainant either that his charge had been dismissed, his file administratively closed, or that conciliation efforts had failed and that a second "right to sue" letter would be issued upon the request of the complainant or his attorney. The Court went on to discuss the uniqueness of the instant case and stated that "[i]n this case we are faced with a mysterious variant on the 'two tier' procedure". *Hefner v. New Orleans Public Service, Inc.*, 605 F.2d at 895. The court distinguished the facts of the instant case from the former two letter procedure and found that:

> This situation is thus entirely different from those in which the first letter communicates that efforts at conciliation have failed and indicates that further action by the EEOC is

> contemplated, (citation omitted) . . . or in which the first letter states only that efforts at conciliation have failed and that the complainant has the right to file suit in federal court (citation omitted)." *Hefner v. New Orleans Public Service, Inc.*, 605 F.2d at 895.

Having found the fact situation presented to be unique, the Court of Appeals examined the nature of the statements made in the first letter sent to appellant and determined that the letter adequately notified appellant of the running of the ninety day limitations period. In finding the section 1981 claim to be barred by laches, the Court further noted the appellant's awareness of the challenged consent order for almost two years prior to his filing suit and the prejudice to the other parties resulting from delayed attacks on such orders.

The decision below turns upon its own facts and will affect few other than the litigants presently before the Court. The legal issues decided are narrow because of the peculiar facts, and the recurrence of the questions presented is highly unlikely.

While various federal courts throughout the country have grappled with the issue of the commencement of the ninety day statutory limitations period under the standard "two letter" procedure formerly utilized by the EEOC, no court has been called on to

determine the effect of a letter such as the one sent to the appellant in this case wherein the Commission notifies the claimant that his file has been administratively closed due to the Commission's lack of jurisdiction and advises the claimant to pursue any further action in the United States District Court or Court of Appeals. Contrary to the argument of appellant in his Jurisdictional Statement, the decision of the Court of Appeals below in this case does not contravene the weight of judicial authority in this country.

Furthermore, any reliance by appellant on an EEOC regulation dealing with notification by the agency of a claimant's right to sue following the commission's failure to conciliate a claim is misplaced since, in the instant case, the agency dismissed appellant's claim for lack of jurisdiction prior to notifying NOPSI of the claim or attempting to conciliate such claim.

The appellant has failed to demonstrate the existence of any substantial federal question warranting further judicial review or to otherwise show any actual conflict of authorities. Further review by this honorable Court is unnecessary and, accordingly, the petition for a writ of certiorari should be DENIED.

CONCLUSION

For the reasons heretofore stated, appellee submits that this appeal is improvidently taken and should be

dismissed based on the Court's lack of jurisdiction. Alternatively, if appellant's Jurisdictional Statement is treated as a petition for writ of certiorari, appellee respectfully suggests that further review by this Court is unnecessary and that the petition should be denied. Appellant has failed to show the existence of a conflict of authorities over the issues presented or to demonstrate the existence of a substantial federal question warranting further judicial review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three printed copies of the foregoing Motion of Appellee New Orleans Public Service, Inc. To Dismiss have been served on Dale C. Wilks, 234 Loyola Avenue, Suite 815, New Orleans, Louisiana 70112 and Louis B. Merhig, 317 Magazine Street, New Orleans, Louisiana 70130, Counsel of record, by depositing the same in the United States mail, postage prepaid and properly addressed, this 18th day of March, 1980.

MICHAEL J. MOLONY, JR.